

Board California Integrated Waste Management Board	Author Bowen	Bill Number AB 362
Sponsor Author	Related Bills	Date Amended As Introduced.

BILL SUMMARY:

AB 362 would require companies that advertise products as "ozone-friendly," "recycled," or "biodegradable" to meet specific standards or face the prospect of criminal charges for misleading consumers. Additionally, companies would be prohibited from using marketing catch phrases such as "ecologically safe" or "ecologically sound" without backing up those claims with documentation.

BACKGROUND:

According to the author, Assemblymember Bowen, the purpose of AB 362 is to reinstate California's Truth in Advertising law, which was enacted into law by AB 3994 (Sher, Chapter 1413, Statutes of 1990) and repealed by SB 426 (Business and Professions Code Sections 17590 and 17580.5, Leslie, Chapter 642, Statutes of 1995). AB 362 would reinstate all the original language that was deleted by SB 426, except for the invalid definition of "recyclable." Current law provides that environmental market claims be consistent with references in the *Guides for Use of Environmental Marketing Claims*, published by the Federal Trade Commission (FTC) on July 27, 1992. However, supporters contend that the FTC Guides are general in nature and do not provide any threshold data. Lack of threshold data or standards may lead to disparity between claims by manufacturers. As an example, two different companies can claim that they have recyclable products, while one maybe marginally recyclable and the other commonly recyclable. The author hopes that enactment of AB 362 would put an end to this type of deceptive advertising that misleads consumers.

However opponents believe that it is more reasonable for manufacturers to follow one environmental advertising standard, the *FTC Guides for Use of Environmental Marketing Claims*, since advertising claims are printed on the outside of containers of products that are shipped to many or all states. They contend that state-only standards have proven to be time consuming and expensive for manufacturers because they must produce one set of product labels for California and another set of product labels for other states.

Departments That May Be Affected Trade and Commerce Agency		
Committee Recommendation	Committee Chair	Date
		20

California's Truth in Environmental Advertising law (also known as the Green Marketing law) has been a subject of contention between business interests and advertisers versus environmentalists and manufacturers of recycled products for many years. SB 426 repealed the definitions contained within the existing environmental advertising law and created current law, which prohibits a person from making any untruthful, deceptive, or misleading environmental marketing claim about a product or package sold or offered for sale in California that does not meet or exceed the *FTC Guides for Use of Environmental Marketing Claims*. The California Integrated Waste Management Board (CIWMB) did not take a position on SB 426.

Before SB 426 was enacted into law, the Green Marketing law (Sher, AB 3994, Chapter 1413, Statutes of 1990) restricted the use of such terms as "recyclable," "ozone friendly," or "biodegradable." A group of ten industry and advertising trade associations sued the State of California over implementation of these provisions, claiming the law violated the right of free speech of advertisers. A ruling by the U.S. District Court (December 24, 1992) upheld the State law, but struck down the term "recyclable" as constitutionally vague and unenforceable.

EXISTING LAW

Federal Law (Code of Federal Regulations, Title 16, Chapter 1, Part 260, Guides for the Use of Environmental Marketing Claims):

1. Provide guidance to the public regarding environmental advertising and marketing practices, including labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, and through any other means.
2. Apply to any claim about the environmental attributes of a product or package in connection with the sale, offering for sale, or marketing of such product or package for personal, family or household use, or for commercial, institutional or industrial use.
3. Explicitly provide that the claims are not enforceable regulations and do not have the force and effect of law.
4. Do not preempt regulations of other Federal agencies or of State and local bodies governing the use of environmental marketing claims.
5. Explicitly provide that compliance with Federal, state or local law concerning environmental marketing claims will not necessarily preclude FTC enforcement action under Section 5 of the FTC regulations.
6. Indicate that it is deceptive to misrepresent, directly or by implication, that a product or package is:
 - Degradable, biodegradable or photodegradable. An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will

completely break down and return to nature, i.e., decompose into elements found in nature within a reasonably short period of time after customary disposal.

- Compostable. An unqualified claim that a product or package is compostable should be substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device.
- Recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated or otherwise recovered from the solid waste stream for use in the form of raw materials, in the manufacture or assembly of a new package or product.
- Contains recycled content. A recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process or after consumer use.

State Law:

1. Provides that it is unlawful for a person to make an environmental marketing claim, whether explicit or implied, that does not meet or exceed the requirements for substantiation or is not consistent with the examples contained in the *FTC Guides for Use of Environmental Marketing Claims*, or is identified as a deceptive claim by those guidelines (Business and Professions Code § 17580.5).
2. Provides that it is a defense to a suit or complaint brought under these provisions if a person's environmental marketing claims conform to the FTC standards (Business and Professions Code § 17580.5).
3. Declares legislative intent that it is the public policy of California that environmental marketing claims, whether explicit or implied, must be substantiated by competent and reliable evidence to prevent deceiving or misleading consumers about the environmental impact of products and packages (Section 1 of Chapter 642, Statutes of 1995).
4. Makes it a misdemeanor, subject to criminal and civil penalties, if this law is broken (Business and Professions Code § 17581).

ANALYSIS

AB 362 would:

1. Repeal existing State environmental advertising provisions, with the exception of criminal and civil penalty provision (#'s 1, 2 and 3 above);
2. Define "ozone friendly" or any like term that connotes that stratospheric ozone is not being depleted, to mean that any chemical or material released into the environment as a result of the

- use or production of a product will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone;
3. Define "biodegradable" to mean a material that has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide;
 4. Define "photodegradable" to mean a material that has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide;
 5. Define "recycled" to mean an article's contents contain at least 10 percent, by weight, postconsumer material as defined in Public Contract Code 12200 (b);
 6. Define "consumer good" to mean any article that is used or bought for use primarily for personal, family, or household purposes;
 7. Provide a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package is not held responsible for that representation;
 8. Make it unlawful for any person to represent that any consumer good, as defined, that it manufactures or distributes is ozone friendly, biodegradable, photodegradable, recyclable, or recycled, unless that consumer good meets specified definitions in State law or definitions established in trade rules adopted by the FTC; and
 9. Require a person who represents that a consumer good it manufactures or distributes is not harmful to, or is beneficial to the natural environment through the use of specified environmental terms, to maintain written records and documentation supporting the validity of that representation, and to provide that information upon request.

COMMENTS

Solid Waste Impacts. The environmental advertising law has a direct impact on the CIWMB and its programs for the following reasons:

- False labeling of products as recyclable could lead some nonrecyclable waste to be disposed into source-separated, recyclable bins (that is, the public will put nonrecycled waste into curbside bins by mistake). This error will lead to higher processing costs for recyclers and local government, making recycling programs more expensive.
- False labeling of products as made from recycled material could cause some consumers to purchase non-recycled products, thus shrinking the market for products genuinely made from recycled material.

Enforcement Issues. The CIWMB does not implement the environmental advertising law; this is the duty of agencies charged to enforce the truth-in-advertising laws by civil and criminal penalties. California's enforcement agencies include the offices of city, county and district attorneys and the State Attorney General. At the Federal level, the FTC has enforcement powers through Section 5 of the FTC regulations. Using these enforcement powers, the FTC has brought actions against manufacturers who have made erroneous environmental benefit claims and the manufacturers have complied with the FTC guidelines.

Difference Between the FTC Guides and AB 362. The FTC guidelines contain general standards regarding advertising that makes general environmental benefit claims, that uses terms such as recyclable, compostable, degradable, biodegradable, ozone safe or ozone friendly, or claims relating to recycled content, or source reduction (for solid waste). The FTC guidelines contain several examples that explain what types of advertising fall within this standard and what considerations are involved in meeting the standards.

The major difference between the FTC Guides and AB 362 is how the term "recycled" is defined. AB 362 requires any product labeled as "recycled" to contain at least 10 percent postconsumer material. Under the current FTC guideline for use of the term "recyclable," a product or package should not be marketed as recyclable unless it can be collected, separated or otherwise recovered from the solid waste stream for subsequent use. Consequently products, which contain only scraps from the manufacturing floor and contain none of the material collected in local residential and business recycling programs can still be labeled as "recycled." A product can be labeled as "recycled" even if the product has no postconsumer material. Consumers expect products that are labeled as "recycled" include postconsumer material that came from the paper, glass, metals and other materials that they recycle at home or work.

The FTC revised its guidelines, effective October 4, 1996, making only minor revisions. The FTC is still in the process of reviewing the "compostable" and "recyclable," guides, and anticipates making modifications to the guides within the next several months. Until that time, the original version of the "compostable" and "recyclable" guides will remain in effect.

National Standards. The FTC Guides provide one environmental advertising standard for manufacturers and individual states to follow and act, in a way, as a uniform national labeling law. Opponents to AB 362 contend that it is more reasonable to use the FTC Guides as the nationwide standard for environmental advertising, rather than each state having its own separate labeling requirements. This is mainly because advertising claims are printed on the outside of the container of products that are shipped to many or to all states. State-only standards could be time consuming and expensive for manufacturers because manufacturers would have to produce one set of product labels for California and another set of product labels for other states.

Differing California Definitions of "Recycled." Generally, California recycled-content law is the more stringent than most other states, partially because the Integrated Waste Management Act mandated that cities and counties to divert 25 percent by 1995, and 50 percent by the year 2000, of all solid waste from landfill or transformation. This waste diversion was possible through source reduction, recycling, and composting activities that were designed to help Californians reach these goals.

Currently, there are no laws or CIWMB regulations defining any of the labeling terms in contained in AB 362, other than "recycled." The CIWMB's Rigid Plastic Packaging Container Program regulations (Title 14, Division 7, Chapter 4, Article 3, Section 17943 [b] [25] of the California Code of Regulations) defines the term "recycled" as "...a product or material that has been diverted from disposal in a landfill and has been reused in the production of another product." The CIWMB's other minimum content program laws and regulations contain definitions related to what is a "recycled product" and specify what postconsumer content is necessary to qualify as "recycled."

Under Project Recycle (State agency program for procurement of recycled products), "recycled product" means all materials, goods, and supplies, no less than 50 percent of the total weight of which consists of secondary and postconsumer material with not less than 10 percent of its total weight consisting of postconsumer material. Postconsumer material is a finished material that would have been disposed of as a solid waste, having completed its life cycle as a consumer item, and does not include any manufacturing wastes.

The term "recycle" or recycling" is also defined in Public Resources Code § 40180 as, "...the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste, and returning them to the economic mainstream as raw material for new, reused or reconstituted products which meet the quality standards necessary to be used in the marketplace....." AB 362 is inconsistent with the minimum recycled content requirements of several CIWMB programs. The CIWMB's minimum content programs define the following percentage for postconsumer content:

- Newsprint - 40 percent (Public Resources Code [PRC] § 42756);
- Plastic trash bags - 10 percent (1 mil thickness) or 30 percent (.75 mil thickness) (PRC § 42291); and
- Rigid plastic packaging containers - 25 percent (or be 10 percent source reduced, or reusable, or refillable) (PRC § 42310).

The bill defines "recycled" as having at least 10 percent, by weight, postconsumer material, as defined in Public Contract Code § 12200 (b). However, there is no indication on how this weight is to be calculated. For example, the weight of paper could be calculated by the weight of the fiber in the paper or by the weight of the total sheet of paper. To avoid this inconsistency, the bill should be amended to make it clear that the definition of "recycled" applies only to Business and Professions Code §'s 17508.5 and 17580.

Drafting Issue. Lastly, when this bill was prepared, a mistake may have been made in the citation of the added Business and Professions Code § 17508.5. Current environmental advertising law is located under Division 7, Part 3, Chapter 1, Article 1 of the Business and Professions Code and includes Sections 17580, 17580.5 and 17581. As numbered, this proposed section (Business and Profession Code § 17508.5) does not appear to belong in this part of the Business and Professions Code.

SUGGESTED AMENDMENT

The author may wish to consider the following technical amendments:

- To avoid inconsistency with current law regarding the definition of "recycled," AB 362 should be amended to make it clear that the definition of "recycled" in AB 362 applies only to the environmental advertising law, and no other existing recycled-content laws.
- Renumber Business and Professions Code § 17508.5 to 17580.5.

LEGISLATIVE HISTORY

AB 362 was introduced on February 19, 1997. AB 362 passed the Assembly Consumer Protection, Governmental Efficiency, and Economic Development Committee (7-4) on April 8, 1997. The bill has been referred to the Assembly Appropriations Committee; no hearing date has been set.

Support: Californians Against Waste
Norcal Waste Systems

Oppose: California Chamber of Commerce
Grocery Manufacturers of America
California League of Food Processors
American Plastics Council
National Food Processors Association

As a member of the State Assembly, Senator Sher made several attempts to enact a constitutionally acceptable definition of "recyclable" through AB 144 in 1991, AB 2496 in 1992, AB 1112 in 1993 and AB 227 in 1995. All of these measures failed passage in the Legislature. The CIWMB adopted a support position on AB 1112 of 1993 and AB 227 of 1995.

FISCAL AND ECONOMIC IMPACT

This bill would have minor, absorbable fiscal impact on the CIWMB and its programs. The bill does not mandate a new State program. Under current law, CIWMB is occasionally called upon to answer questions about environmental labeling, but the workload involved is insignificant. With the proposed changes in AB 362, this minimal workload would likely continue.

If AB 362 is enacted, criminal and civil penalties could be imposed against those manufacturers who may possibly be making deceptive comments about environmental attributes of their products or the packaging of their products. Additionally, since advertising claims are printed on the outside of containers of products that are shipped to many or all states, enactment of the bill could cause additional costs for manufacturers who may be forced to produce one set of product labels for California and another set of product labels for other states.

SUGGESTED AMENDMENT TO AB 362

- On the title page:

Renumber Business and Professions Code § 17508.5 to 17580.5

- On page 2, line 1:

Renumber Business and Professions Code § 17508.5 to 17580.5

- On page 3, line 8, after "Code." Insert:

This definition will apply only to environmental advertising law, and no other existing recycled-content laws.